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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NO. 90-155

In re RICHARD MILLAN,

Petitioner

v.

HON. WILLIAM J. REA, JUDGE
HON. EDWARD RAFEEDIE, JUDGE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Respondents.

MARSHA BENNETT
COLLEEN STEINBAUGH

Real Parties in Interest

PETITION FOR A WRIT OF MANDAMUS/PROHIBITION

BRIEF OF REAL PARTIES IN INTEREST

STEVEN K. LUBELL
1234 Sixth Street
Suite 203
Santa Monica, CA 90401
(213) 451-9904
Attorney for Real
Parties in Interest

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OPINIONS BELOW

To Real Parties in Interest knowledge there are no official reports of the following Order's of the District Court

denying Petitioner's:

1. Dismissing Appeal and Denial of request to stay proceedings;
2. Denying Leave to Amend Complaint;
3. Denying Motion to Disqualify Judge William J. Rea, U.S. District Court for the Central District of California;
4. Summary Judgment.

There are unpublished findings of fact and conclusions of law on Real Parties in Interest's motion for partial summary judgment issued by the Hon. William Rea. on December 6, 1988.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1651.

STATEMENT OF THE CASE

The Petitioner was the husband of the Real party in Interest, Marsha Bennett and the son in law of the Real Party in Interest, Colleen Steinbaugh. The marriage, which

resulted after a brief two (2) month courtship, ended after seven (7) months. Since the demise of the marriage, Petitioner, has used certain legal knowledge pro se to harass, humiliate, and annoy Real Parties in Interest.

Petitioner filed a RICO action pursuant to 18 U.S.C. §§ 1961-1968 against Real Parties in Interest in the United States District Court for the Central District of California on April 10, 1987.

Upon learning that Real Party in Interest, Marsha Bennett remarried, Petitioner, moved to amend his RICO complaint to include as an additional party Uday Sawhney, the new husband of Real Party in Interest, Marsha Bennett. On April 19, 1988, Petitioner's motion to amend the RICO complaint was denied by the Hon. William J. Rea, United States District Judge.

Thereafter, Petitioner filed a motion to recuse the Hon. William J. Rea, District

Court Judge and disqualify Steven K. Lubell the attorney of record for Real Parties in Interest. On August 26, 1988, the Hon. Edward Rafeedie, United States District Court Judge denied Petitioner's motion to recuse the Hon. William J. Rea, United States District Judge. Real Parties in Interest knows of no order regarding the disqualification of the attorney of record for Real Parties in Interest.

On November 8, 1988, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit seeking an appeal from an order from the Hon. Edward Rafeedie, Judge of the United States District Court for the Central District of California denying Petitioner's motion to recuse the Hon. William J. Rea, Judge of the United States District Court for the Central District of California.

On December 19, 1988 the United States Court of Appeals for the Ninth Circuit

ordered that the order appealed from does not appear to be a final order because it did not dispose of all claims as to all parties. Petitioner was ordered to voluntarily dismiss the appeal.

On April 11, 1989 an Order to Show Cause was issued by the United States Court of Appeals for the Ninth Circuit on the basis that there had been no voluntary dismissal of the appeal.

On March 9, 1990 an Order was entered from the United States Court of Appeals for the Ninth Circuit dismissing the appeal for failure to comply with rules requiring processing the appeal to a hearing.

Petitioner has not perfected any Petition for a Writ of Mandamus/Prohibition to the United States Court of Appeals for the Ninth Circuit prior to the filing of the instant petition for a Writ of Mandamus/ Prohibition.

SUMMARY OF ARGUMENT

Federal laws provide for the orderly administration of justice.

Petitioner desires to circumvent adverse rulings made by the District Court Judge by attempting to recuse the District Court Judge.

Petitioner has not raised any factual basis to support a legal finding of bias or prejudice of the District Court Judge.

Mandamus is not a proper remedy concerning decisions by the District Court Judge pertaining to amendments of pleadings and partial summary judgment.

Petitioner is attempting to discredit the Attorney of Record for Real Parties in Interest solely as a tactical advantage to Petitioner in this litigation.

ARGUMENT

I.

THE ISSUANCE BY THE COURT OF ANY EXTRAORDINARY WRIT IS NOT A MATTER OF RIGHT, BUT OF DISCRETION SPARINGLY EXERCISED.

Rules of the U.S. Supreme Court Rule 20 provides as follows:

> "The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

Real Parties in Interest submit that the Petitioner has failed to indicate how the issuance of a writ of mandamus/prohibition as requested by Petitioner will aid in this Court's appellate jurisdiction. There must be an indication to this Court of how the issuance of the extraordinary writ will aid

in this Court's appellate jurisdiction before the Court can determine if an extraordinary writ may issue.

The circumstances alleged by Petitioner are not extraordinary circumstances warranting the exercise of this Court's discretionary powers. Rather, the circumstances alleged are part of a tactic by Petitioner to harass and circumvent the orderly administration of justice.

Prior to filing the instant petition for an extraordinary writ the Petitioner has not sought a similar remedy in the U.S. Court of Appeals. Adequate relief should properly first be attempted to a lower court in which there is a similar remedy before requesting an extraordinary writ from the Supreme Court.

II.

WHILE A LITIGANT APPEARING IN PROPRIA PERSONA IS ENTITLED TO THE SAME CONSTITUTIONAL PROTECTION AFFORDED TO LITIGANTS REPRESENTED BY COUNSEL, THE COURT HAS AN OBLIGATION TO PROTECT AND PRESERVE THE SOUND AND ORDERLY ADMINISTRATION OF JUSTICE.

The problem facing the Court--that of a pro se litigant flooding the court with meritless, fanciful claims is by no means new to the federal court system. The burden on the system when faced with just one litigant who has a fanatical desire to flood the courts has been noted. Urban v. United States 768 F.2d 1497 (D.C. 1985).

It is axiomatic that no petitioner or person shall ever be denied his right to the processes of the court. In Re Carl Clovis Green, 598 F.2d 1126, 1127 (8th Cir. 1979) (en banc). The right of process to the court is a basic constitutional right guaranteed to all. See., Article I Amend. 1.

Yet, it is also well settled that a court may employ remedies to protect the integrity of the courts and the orderly and expeditious administration of justice. See, e.g., In Re Martin-Trigona, 737 F.2d 1254, 1261 (2d Cir. 1984) (affirming in part district court order granting an injunction against vexatious pro se litigant); In Re Green, 669 F.2d 779, 787 (D.C.Cir.1981) (ordering district court to enjoin pro se litigant from filing suit without leave of the court); Ruderer v. United States, 462 F.2d 897, 899 (8th Cir.), cert. denied, 409 U.S. 1031, 93 S. Ct. 540 (enjoining pro se litigant from filing further suits relating to discharge from army).

In this case what the District Court has done is balance Petitioner's right to present a claim with the District Court's right to prevent a vexatious litigant. While the result is a discontented litigant, the court system has worked as it is intended to by

causing the orderly administration of justice which is also designed in part to prevent frivolous lawsuits.

Petitioner asserts that because he is pro se he should not be held to as high a standard as if represented by counsel. The opportunity to appear pro se, however, is not a license to submit material that a pro se petitioner knows is irrelevant and insulting. Taylor v. Commissioner of Internal Revenue, 771 F.2d 480 (11th Cir. 1985).

The court has an obligation to protect and preserve the sound and orderly administration of justice. In Re Martin-Trigona, 737 F.2d 1254, 1262 (2d Cir. 1984). By refusing to allow Petitioner to amend his complaint the District Court, while being extremely solicitous to Petitioner, adhered to their obligation and in fact has properly protected and preserved the sound and orderly administration of justice.

III.

PETITIONER'S BASIS TO RECUSE THE DISTRICT COURT JUDGE IS NOT BASED UPON A FACTUAL BASIS NECESSARY TO ESTABLISH PERSONAL BIAS OR PREJUDICE.

The basis for disqualification of a trial judge of a United States Court is that "personal bias or prejudice" exists, by reason of which the judge is unable to impartially exercise his functions in the particular cases. 28 U.S.C. § 144.

It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in a pending

case. The writ of mandamus will be granted by the Supreme Court only when it is clear and indisputable that there is no other legal remedy. Ex Parte Am. Steel Barrel Co. (1913) 230 U.S. 35, 33 S. Ct. 1007.

Here, Petitioner is attempting to utilize the writ of mandamus procedure because petitioner is discontented that the District Court Judge has properly refused to allow Petitioner leave to amend his complaint and because the District Court Judge granted real parties in interest motion for partial summary judgment.

Petitioner asserts as the basis for the writ of mandamus to recuse the District Court Judge the alleged facts that Petitioner contends establishes the personal bias or prejudice of the Hon. William J. Rea is that: (1) a Law Clerk identified by Petitioner only as "Harry" had an ex-parte conversation with Real Parties in Interest's attorney of record regarding the re-scheduling of a hearing on

Real Parties in Interest motion for summary judgment and Petitioner's cross-motion for summary judgment; and, (2) that the hearing on the motions for summary judgment were changed from the morning calendar to the afternoon calendar at which time Petitioner alleges security personnel watched every move Petitioner made causing Petitioner to be intimidated.

To claim bias without more is insufficient. The facts and the reasons for the belief that such bias or prejudice exists must be set out. Petitioner has failed to set out plainly how the re-scheduling of the motion has biased him. Whether a judge is disqualified depends not upon mere facts that prejudice has been charged, but upon the facts which are alleged tend to show such prejudice.

Assuming, arguendo, that security personnel watched every move Petitioner made how does that show prejudice to Petitioner?

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Does that not only show the court's regard for the orderly administration of justice.

With respect to the changing of the hearing time on the motions for summary judgment, one would think that the change of time for the hearing on the summary judgment motions were for the orderly administration of justice in that it gave the Petitioner the ability to argue his case without concern, with the time limitations often imposed upon litigants during the District Court's regular motion calendar.

Petitioner has taken what appears to be the Court's solicitousness to Petitioner and turned it around to allege that the Court is biased and prejudiced to Petitioner.

The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances. Kerr v. United States District Court for the Northern District of California 426 U.S. 394, 96 S. Ct. 2119 (1976).

Petitioner has the burden of showing that

his right to issuance of the writ is clear and indisputable. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 74 S. Ct. 145 (1953). Clearly, under these circumstances petitioner has not established such extraordinary circumstances as to warrant the requested petition for mandamus/prohibition.

IV.

MANDAMUS IS NOT PROPER TO CORRECT AN ALLEGED ERROR REGARDING THE REFUSAL TO ALLOW AN AMENDMENT TO A PLEADING.

A writ of mandamus is not proper to correct an alleged error by a district judge in refusing to allow an amendment to a pleading. Ex-Parte Martha Bradstreet 32 U.S. 634 (1 Pet. 1833). To allow such a remedy would be a method to control or coerce the discretion of a subordinate tribunal. Permitting amendments is a matter of discretion that must be preserved to the lower court.

The District Court Judge made a decision to deny Petitioner the right to file an amended complaint. Petitioner responded to the denial with a motion to recuse the District Court Judge without setting forth facts establishing bias or prejudice to Petitioner. Petitioner is attempting to circumvent the decisions of the District Court Judge with the filing of this petition.

V.

AN ORDER REFUSING TO GRANT A MOTION FOR SUMMARY JUDGMENT DOES NOT SATISFY THE EXTRAORDINARY CIRCUMSTANCES TEST FOR ISSUANCE OF A PREROGATIVE WRIT.

The District Court denied Petitioner's motion for summary judgment and granted partial summary judgment to Real Parties in Interest.

It is completely clear that an order refusing to grant a motion for summary judgment is not a final decision under

Section 1291 of the Judicial Code, 28 U.S.C. § 1291. See Chappell & Co. v. Frankel 367 F.2d 197 (2nd Cir. 1966); Doehlter Metal Furniture Co. v. Williams, 149 F.2d 130, 135 (2nd Cir. 1945). The judgment of partial summary judgment is not reviewable as a final judgment under 28 U.S.C. § 1291. Chacon v. Babcock, 640 F.2d 221, 222 (9th Cir. 1981). It is almost equally clear that the Court ought not review a lower court's denial of a summary judgment motion by means of a prerogative writ pursuant to the All Writs Statute. 28 U.S.C. § 1651(a). Traditionally, the prerogative writs have been reserved for extraordinary circumstances. In re Josephson, 218 F.2d 174 (1 Cir. 1954).

A garden variety denial of a summary judgment motion can hardly satisfy the extraordinary circumstance test necessary before a writ may issue. Chappell & Co. v. Frankel 367 F.2d 197 (2nd Cir. 1966).

VI.

MANDAMUS IS NOT PROPER TO SEEK DISQUALIFICATION OF AN ATTORNEY WHEN PETITIONER'S MOTIVATION IS TO ANNOY AND HARRASS.

Petitioner seeks to disqualify Real Parties in Interest's attorney on the basis that he allegedly suppressed evidence in discovery. However, Petitioner never moved the District Court to compel responses to discovery that Petitioner now at this juncture finds lacking. Instead, Petitioner now attempts an insulting attack on Real Parties in Interest's attorney of record. It is clear that Petitioner moved to disqualify Real Parties in Interest Attorney of Record and recuse the District Court Judge in response to a denial by the District Court of Petitioner's motion for leave to amend his complaint. If there was no attempt by Petitioner to compel discovery and remedy any alleged wrongdoing at the District Court level, then clearly the petition for mandamus

does not show an usurpation by the District Court that warrants the extraordinary remedy of a writ of mandamus. See., Kerr v. United States District Court for the Northern District of California 426 U.S. 394, 96 S. Ct. 2119 (1976). In exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available to an attorney who is disqualified or to a litigant when a motion for disqualification is denied. See., Richardson-Merrell, Inc. v. Koller 472 U.S. 424, 105 S. Ct. 2757 (1985). However, regardless of the ultimate decision of the District Court with respect to disqualification of Real Parties in Interest's Attorney of Record, this is not the exceptional circumstance for which a writ of mandamus was designed.

The Court has previously recognized the tactical use of disqualification motions to harass opposing counsel. The District Court

Judge has primary responsibility to police the prejudgment tactics of litigants, and the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings. Richardson-Merrell, Inc. v. Koller 472 U.S. 424, 436, 105 S. Ct. 2757 (1985). It is widely understood by judges that attorneys now commonly use disqualification motions for purely strategic purposes. Woods v. Covington Cty. Bank (5th Cir. 1976) 537 F.2d 1288, 1289.

Real Parties in Interest respectfully and adamantly submit that Petitioner's attempts to disqualify their Attorney of Record is solely designed to harass and circumvent the decisions of the District Court.

CONCLUSION

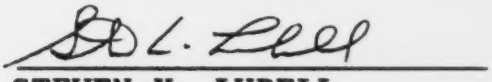
While there must be a civility between litigants there must also be a balancing determination by the court as to what is

proper and what is intended merely to circumvent the orderly administration of justice.

On this basis, the Court is respectfully requested to deny Petitioner's request for a writ of mandamus/prohibition.

Dated this 8th day of August, 1990.

Respectfully Submitted,



STEVEN K. LUBELL
Attorney for Real Parties in Interest
MARSHA BENNETT &
COLLEEN STEINBAUGH